Supreme Court, U. S.
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SEP 9 1976
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

UNITED STATES OF AMERICA	:	
	:	
Petitioner	:	
	:	
v.	:	No. 76-167
	:	
CHARLES W. RAMSEY and JAMES W. KELLY	:	
	:	
Respondents	:	
	:	

BRIEF OF RESPONDENT JAMES W. KELLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(Appointed by the United States Court of Appeals, District of Columbia Circuit, under the Criminal Justice Act)

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UNITED STATES OF AMERICA Petitioner v. CHARLES W. RAMSEY and JAMES W. KELLY Respondents	:	No. 76-167

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Respondent Kelly accepts the Question Presented, the Statement of the Case, and the other formal portions of the petition for a writ of certiorari, and proceeds to the body of his Opposition.

REASONS FOR DENYING THE WRIT

1. There is no square conflict.

The first (and obviously the major) reason advanced by the Government for granting the writ is that there is a conflict of circuits and that the court below "acknowledged that it was creating a conflict among the circuits" (Petition, p. 9). Indeed the majority of the Court of Appeals did believe its decision was in square conflict with the Seventh Circuit and the Ninth Circuit, see App. A, p. 6a, as did the dissenting judge, see App. A, p. 20a, but analysis of the cited decisions shows, surprisingly, that while a superficial conflict does exist, none of the cases cited by the Court of Appeals can be said to be in square conflict with the decision below.

The decision below not only held that a warrantless search of international letter mail violated the Fourth Amendment (and to that extent there is indeed a conflict with the Seventh and Ninth Circuits), but it also brought in the First Amendment as an important factor, since communication is involved. It is the conjunction of these two Constitutional mandates that gives the decision below its unique nature, unique because none of the allegedly conflicting decisions touches this point. And none of those decisions devoted, to the basic issue, the careful and scholarly attention that was invested by the Court below.

Indeed, of the cases cited (by both the majority and the minority below) as being in square conflict,[1] only one, United States v. Odland, 502 F. 2d 148, even purported to deal at any length with the issue raised here. In Odland, the Seventh Circuit did not deal with 19 U.S.C. 482 as did the court below (see Pet. App. A, p. 13a) but did sustain under 39 CFR 61.1 a search, without a warrant and without probable cause, of mail originating outside the United States.[2] The Seventh Circuit expressly held that the confidentiality of mail is guaranteed only to first class mail (that is, domestic mail), 502 F. 2d at 150, citing 39 U.S.C. 3623(d). The Seventh Circuit dealt only superficially with the Fourth Amendment and did not mention the First Amendment at all. And in its other cited decision, United States v. Bolin, 514 U.S. 554 (1975), the Seventh Circuit in sustaining a warrantless search of international mail did no more

1/ United States v. Bolin, 514 F. 2d 554 (7th Cir., 1975); United States v. Odland, 502 F. 2d 148 (7th Cir., 1974), cert. den., 419 U.S. 1088; United States v. Barclift, 514 F. 2d 1073 (9th Cir., 1975), cert. den. 423 U.S. 842.

2/ 39 CFR 61.1, printed at Pet. App. A, pp. 24a-25a, provides: "All mail originating outside the customs territory of the United States is subject to customs examination" (with the exception of diplomatic or official mail. The regulation is an implementation of 19 U.S.C. 1582 (printed at Pet. App. A, p. 22a, which provides: "The Secretary of the Treasury may prescribe regulations for the search of persons and baggage..."

than cite the Odland decision, without again reviewing the law.

The Ninth Circuit, in a per curiam decision in United States v. Barclift, 514 F. 2d 1073 (1975), sustained a warrantless search of international mail on only the briefest of discussions, basing its decision neither on 19 U.S.C. 482 nor 39 CFR 61.1; instead, the Ninth Circuit rested its holding on 19 CFR 145.2 (printed at Pet. App. A, p. 23a),[3/] and cited the Odland decision with approval. (The Ninth Circuit appears to believe - incorrectly - that the Odland opinion also relied upon 19 C.F.R. 145.2)

No mention was made of the First Amendment; indeed, the entire discussion of the search issue is shockingly short (three paragraphs on pp. 1074-5).

There thus is no agreement among the circuits upon exactly what statute or regulation is involved, the court below not having mentioned either of the two regulations relied upon by the Seventh and Ninth Circuits, and it cannot be said that there is a square conflict of circuits.

2. The decision below should be given time to make its influence felt.

The thoroughness and persuasiveness of the decision below is such (especially as compared to the brief, almost cryptic, discussions of the Seventh and Ninth Circuits) that it seems an excellent possibility that the opinion below will influence all future decisions and thereby obviate any conflict, making it unnecessary for this

3/ 19 C.F.R. 145.2 is almost a duplicate of 39 C.F.R. 61.1. It provides: "All mail originating outside the Customs territory of the United States, whether sealed or unsealed, is subject to Customs examination, except" (and the exceptions are diplomatic or official mail).

Court to devote its time to this matter. The Court should deny the writ at this point and allow a reasonable period of time to see whether the conflict, if there is one, disappears.

Despite the efforts of the Government to make it appear that the decision below has created a crisis for the Customs Service, a cool appraisal of the facts indicates that no critical problem exists. Given the fact that this Court has sustained the authority of Government officials to delay first class mail for a period of at least 29 hours while they investigated suspicious circumstances and then obtained a search warrant, United States v. Van Leeuwen, 397 U.S. 249 (1970), a unanimous decision, the solution is clear. The Customs officials could collect any suspicious international letter mail, take the appropriate time to present it properly to a magistrate, and obtain a warrant.[4/] Certainly the impressive testimony of the Customs Inspector in this case would virtually guarantee the issuance of a warrant, thereby obviating the confrontation that the Government appears to have forced. There is no necessity to have a confrontation or to have this Court decide the issue at this very moment.

One of the chief factors influencing the denial of the issuance of the writ in this case should be the impact of the First Amendment on the warrant requirement of the Fourth Amendment in cases involving letter mail, an impact which (as we have said) was totally ignored by the other courts. The decision of the court below was so clearly correct and so impressive on this point

4/ As was pointed out below by the Court of Appeals, Pet. App. 17a, this is precisely what the authorities in Washington, D.C., did when similar envelopes arrived at the Washington Post Office. The procedure appears to have caused the authorities no particular problem.

that we confidently expect it to have great influence on other federal appellate courts; we expect to see its rationale adopted. We think this Court should give the decision its opportunity to circulate among other courts and to make its weight felt. As the court below pointed out in the portion of its opinion dealing with First Amendment considerations, Pet. App. 11a-14a:

> "Finally, and probably most important, letter mail is a vital means of communication in our society. Letters express the most important and sensitive of our personal, familial, political, professional, and financial affairs. They implicate both our deepest privacy and our interest in free expression, far more than packages or suitcases or automobiles. In the words of Justice Holmes, 'the use of the mails is almost as much a part of free speech as the right to use our tongues.' United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting), quoted with approval in Blount v. Rizzi, 400 U.S. 410, 416 (1971), and United States v. Van Leeuwen, supra, at 251.
>
> Even if the ordinary practice of the Customs Service is not to read the mail that is opened, see note 9 infra, mere knowledge on the part of individuals of the practice of routinely opening mail inhibits the exercise of free speech. See Procunier v. Martinez, 416 U.S. 396, 423 (1972) (Marshall, Jr., concurring); cf. Talley v. California, 362 U.S. 60, 65 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958). And the Supreme Court has indicated that limits on search and seizure must be especially strong where First and Fourth Amendment values converge. See, e.g. United States v. United States District Court, supra, at 313-14; Stanford v. Texas, 379 U.S. 476, 485 (1965).
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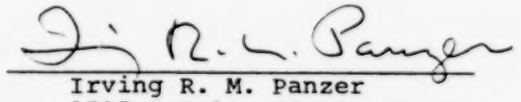
> The Court has also noted, with reference to the need to enforce Fourth Amendment protections, that '[h]istory abundantly documents the tendency of Government - however benevolent and benign its motives - to view with suspicion those who most fervently dispute its policies.' 407 U.S. at 314. The recent disclosures about the widespread illegal searches of mail by United States intelligence agencies, see e.g., REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES [THE ROCKEFELLER COMMISSION], June 1975, at 101-15, 168; S. REP. No. 755, 94th Cong., 2d Sess., Book II, at 12, 17, 38, 62, 107-08 (1976); id., Book 3, at 559-677; Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. Vol 2, at 1-2, 15-16, 51-63, 66, 76 (1975); id., Vol. 4, at 2,4,6-7, 10-11, 21-22, 31-35, 38, 43, 148, 150, 163; id., Vol. 6, at 202-06, 367, highlight the importance of the Supreme Court's observation. The Supreme Court has also stated, as one reason supporting its requirement that warrants be obtained for electronic surveillance related to the domestic aspects of national security, that '[b]y no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.' United States v. United States District Court, supra, at 321. Routine opening of international mail presents the same threat to First Amendment interests, and enforcing the protections of the Fourth Amendment can provide law-abiding citizens with the same important assurance.
>
> It thus appears that there is not a sufficient need, and there is too great a risk to personal privacy, to extend the border search exception to permit unrestrained opening of international mail. We believe that the values protected by the First and Fourth Amendments demand that, before international letter mail is opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate. "

It is unnecessary for this Court to devote its attention to this matter at this time. The petition for a writ of certiorari should be denied.



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